SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 368

HILDA OGDEN BRATT, BARBARA ANN BRATT, a Minor, by Her Guardian *Ad Litem*, Hilda Ogden Bratt, JOAN NANCY BRATT, a Minor, by Her Guardian *Ad Litem*, Hilda Ogden Bratt,

Petitioners,

vs.

WESTERN AIR LINES, INC., a Corporation,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari in Case of Bratt v. Western Air Lines, Inc.

I.
Statement of Case.

The issues involved in the case before the court (and of the kindred cases which by stipulation abide the rule of this case) have been twice tried, and twice the jury has returned its verdict in favor of the defendant Air Lines. Upon the first occasion an appeal was successfully prosecuted by plaintiff because of technical errors in the rejection of certain offered evidence. On the second trial,

plaintiffs have unsuccessfully appealed it to the United States Court of Appeal for the 10th Circuit (see *Bratt, et al., v. Western Air Lines, Inc.*, 155 F. 2d 850; *Bratt, et al., v. Western Air Lines, Inc.*, 169 F. 2d 214).

There are some inaccuracies in the "Summary Statement Of Matter Involved" in the petition, but they are probably immaterial to the determination of the issue on this petition, for this court will find that they are all considered and put aside by the very apt and concise discussion of the facts, and the law in the decision by Phillips, Circuit Judge, who delivered the opinion for the 10th Circuit.

The first question presented in the petition at page 5 thereof seems to leave the impression that this case was not submitted to the jury on the doctrine of *res ipsa loquitur*. However, there can be no question of the fact that, as stated by the Circuit Court, the plaintiffs relied *wholly* on the *inference* of negligence under that doctrine, and with reference thereto, the trial court properly instructed the jury.

The second question, at page 5 of the petition, poses the issue of whether or not a deceased employee of a common carrier, who is killed in the accident from which this litigation grows, is entitled to the presumption—the same as every other human being—that he exercised reasonable care for his own concern.

Argument.

Since, as we have pointed out, the only basis upon which this case was submitted to the jury at all, was that plaintiff was entitled to rely upon the doctrine of *res ipsa loquitur*, the second issue raised by the petition becomes immaterial when it is shown that the petitioner themselves removed this issue from the cause. They did this during the final argument which, in turn, was at a time prior to the instruction given by the Court. In other words, if the plaintiffs at trial took the position that Captain Loeffler and his assistants in flying the plane were not negligent, it is inconceivable that petitioners could be injured by an instruction of the Court which did not go beyond the admissions of plaintiff's counsel. This situation is frankly and squarely set out in the opinion wherein the Court quoted from the closing argument as follows:

> "A violent effort was made to convince you folks that we have charged Captain Loeffler with terrible disregard of duty.
>
> "Why, I can picture in my mind those last terrific moments; I can see that plane shooting down out of the air to destruction, to death; I can see that valiant boy in there fighting his heart out. Captain Loeffler went to his death simply because Western Air Lines violated the same duty to him that they violated to everyone else in that plane.
>
> "We do not charge Captain Loeffler with a violation of duty. We do not charge him with stunting. We do not charge him with engaging in activity that was likely to cause death just to gratify any whim or caprice that might have actuated his activity at that time.

"This proof demonstrated that this plane crashed to the ground bringing death to the occupants of that plane because of a structural weakness and failsure—that is brushing all the rest of the cobwebs of this case aside and looking at it as it is. That is what this case it (is), a case of structural failure.

"Now that is the only answer."

Petitioners, at page 11 of the petition, rely on the case of *Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, wherein it was stated that it was error for the court to refuse to frame the instructions to present the rule with respect to the *prima facie* case, etc. It is apparent that such case is not in point where the petitioners themselves have "framed the issues" as to the basis upon which negligence was charged, namely, negligence proximately causing the structural failure. It would have been well within the province of the trial court in view of the closing argument on behalf of petitioners at trial, to have told the jury in so many words that petitioners had abandoned the claim that the pilot was negligent, and were basing their cause solely, and alone, upon the proposition that the doctrine of *res ipsa loquitur* related to the structural defect, and *not to the management and control of the airplane by Captain Loeffler*.

The fallacy with petitioner's position is that they assume that the instruction meant, and they have attempted to interpret it to the reviewing courts as meaning, that the jury could infer that *Western Air Lines*, the defendant, exercised reasonable care, and that therefore prejudicial error has been created. Even if plaintiffs had not withdrawn this issue from the jury themselves, by admitting that they did not charge the pilot with negligence, such a

position would not be justified by the instruction. The most that can be said for it was that it instructed upon the usual basis or proposition discussed in the opinion below, that self preservation is the first law of nature, and that a deceased is presumed to have exercised reasonable care *for his own concern.*

As is pointed out in the petition, this would not have been sufficient in any event to have relieved Western Air Lines of liability. The jury was instructed amply that the obligation of the defendant, the common carrier, was to exercise *the highest degree of care.* Therefore, if plaintiff had permitted the issue of the pilot's negligence to remain in the case, an instruction that the *pilot* was presumed to have exercised reasonable care would have fallen far short of the degree of care required of the defendant, and with reference to which the jury was amply instructed To rephrase it, a person who exercises only reasonable care does not exercise the highest degree of care. Therefore, to say that a pilot may be presumed to have exercised reasonable care for his own protection, would not be in conflict with the instruction that under the doctrine of *res ipsa loquitur* the happening of the accident raises the inference that the defendant air lines *failed to exercise the highest degree of care.*

We believe that one further analysis of the proposition presented indicates that petitioners are merely grasping at straws in the hope that this Honorable Court may give them one more opportunity to present a lost cause. That analysis is as follows:

The degree of care which the pilot employee of the common carrier was required to use was the same as the common carrier itself was required to use, namely, the highest

degree of care. The instruction to the jury to the effect that all human beings who have been killed in an accident such as this are presumed to have exercised reasonable care for their own concerns was not the equivalent of saying that the pilot was to be presumed to have exercised the highest degree of care for his own concerns. Therefore, had the issue not been withdrawn from the jury by counsel's bold statement that they *charged the pilot with no negligence of whatever character,* the issue of whether or not the pilot exercised the *highest degree of care* would have been untouched and open to determination. The charge of counsel for petitioners in the final argument to the jury that the defendant Western Airlines, because of its negligence in maintenance, was responsible for the structural failures and, therefore, should be charged with liability or responsibility for the death of Captain Loeffler, as well as the death of the various passengers, was an issue the fabric of which was manufactured by counsel themselves on behalf of petitioners, and petitioners may not now, we submit, seek the protection of this Court to avoid the responsibility of their own engagements seeking to retry an issue which they withdrew from the jury.

As an example of our position, we might consider what would have been the situation had the trial court submitted a special interrogatory inquiring of the jury: "Do you find that the pilot, Captain Loeffler, was negligent in his conduct in the management and flying of the airplane?" Presuming the jury answered this in the affirmative, could it be questioned that this would have been error, in view of the unlimited withdrawal from the jury of any such issue?

The petition sets out numerous cases which it is claimed are in conflict with the decision of the Honorable Circuit

Court of Appeals below. It would serve no purpose, we think, to analyze these various cases from which small excerpts have been taken. We have reviewed them. We find that they are not in conflict with the decision of the Circuit Court of Appeals in any respect. That Court, having given due consideration to all of the law, and having concluded that if there was error it could not have been prejudicial, in view of the position taken by petitioners themselves.

Conclusion.

It would seem apparent that since the case was submitted, not to one jury, *but to two juries,* upon the doctrine of *res ipsa loquitur,* and *since petitioners themselves told the jury that the pilot was free from negligence,* the court's instruction to the jury that they, the jury, might infer the very thing which petitioners had already admitted, could not possibly be prejudicial.

We submit that the attempt to have this Court review the decision below upon the theory that the application of the doctrine of *res ipsa loquitur* should be made more certain is without foundation. We make our statement upon the record which shows that in each appeal the Tenth Circuit Court has placed its decision squarely upon the proposition that it was proper to submit the issues to the jury upon the doctrine of *res ipsa loquitur.*

In any event, there is no justification, in the light of the Opinion itself, upon which to predicate the claim that there is a conflict between the decisions of the various Circuit Courts of Appeals; the alleged conflict comes only if it should be assumed that the instruction of the trial court was at variance with the position of plaintiffs below

on the vital issue there involved. As Circuit Judge Phillips so ably pointed out, all claim of such conflict disappears, when faced with the statement of counsel in argument, withdrawing from the jury the very issue with reference to which claim of conflict is made.

For the same reason, likewise, there is no question of great importance involved in the appeal as it stands, and therefore no basis for that reason why this Court should spend its valuable time in considering issues which are of no great importance and which exist only if the Petition should be read without checking it against the decision of the 10th Circuit Court. To accept the proposition that issues such as here presented should as a matter of principal be reviewed by this Court would mean that the Court would be swamped by the tremendous task of reviewing almost every decision of the various Circuit Courts of Appeals. There is no merit to justify favorable consideration of the Petition for Writ of Certiorari.

It is therefore respectfully submitted that the Petition for a writ of Certiorari to the United States Court of Appeals, 10th Circuit, should be denied.

Respectfully submitted,

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